Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd

HIGH COURT (KOTA KINABALU) — SUIT NO K(22) 30 OF 1995
IAN CHIN J
3 APRIL, 6 MAY 1995

Civil Procedure *— Parties — Assignment — Whether assignor needs assignee's consent before commencing action — Whether assignment by way of charge*

Civil Procedure *— Affidavits — In support of application for injunction — Whether affidavits served out of time — Rules of the High Court 1980 O 32 r 13(2)(a)*

Civil Procedure *— Injunction — Injunction restraining defendants from disposing of land — Whether defendant entering into sham transaction to dissipate assets*

The plaintiffs bought houses from the developer of a housing project (the defendants). The defendants failed to complete the houses and eventually abandoned the housing project. In 1992, the Ministry of Local Government and Housing took over control of the project but the plaintiffs were required to make additional payments towards the completion of their houses. On 10 September 1994, the defendants entered into an agreement to sell a parcel of the land to W Sdn Bhd for RM1.7m. In a supplementary agreement dated 11 September 1994, the defendants undertook to complete certain earth and infrastructure works. The stamp duty for that agreement was paid on 22 February 1995. The defendants subsequently informed W Sdn Bhd that they were unable to complete the works as stipulated in the supplementary agreement and RM1.3m was accordingly deducted from the purchase price. On 8 February 1995, the defendant asked one of the plaintiffs to remove the caveats he had lodged. As a consequence, the plaintiffs claimed damages of RM1.2m and applied for an injunction restraining the defendants from disposing of the land. The defendants raised the following preliminary objections: (i) that the plaintiffs should have obtained the consent of the financial institutions to which they had assigned their rights before commencing the action; and (ii) that the documents relating the action have not been served within 14 days of filing as required by RHC O 32 r 13(2)(a).

Held, granting the injuction:

(1) It is only an absolute assignment, not purporting to be by way of charge only, that prevents an assignor from commencing an action without the authority of an assignee. In order to determine whether an assignment is absolute or not, regard must also be had to any surrounding (circumstances) which

might legitimately be taken into consideration. In the present case, the aim of the whole transaction and the assignment was purely for the purpose of securing the loan. Accordingly, the assignment to the financial institutions must have been by way of charge only and the plaintiff can commence an action without the consent of the financial institutions concerned.

(2) The documents for the application were not served out of time. The application was originally ex parte, and when the court ordered an inter partes hearing, the new date of hearing did not permit compliance with O 32 r 13(2)(a) of the RHC. When the court ordered the inter partes hearing on a new date, it meant the time had been abridged.

(3) The whole transaction relating to the sale of the land to W Sdn Bhd reeked of fraud and an attempt to dissipate the defendants' assets. There was no mention in the agreement to sell dated 10 September 1994 of the works to be carried out by the defendants or of their assuming that liability. Real property gains tax was calculated by reference to the purchase price with no account taken of the deduction of RM1.3m. There was also no explanation as to why the supplementary agreement was not stamped until 22 February 1995 when it was signed on 11 September 1994. Thus, there was plenty of evidence to support the submission that the supplementary agreement was back-dated and made for the purpose of dissipating the defendants' assets in the event that the plaintiffs recovered judgment from the defendants.

[Bahasa Malaysia summary

Plaintif-plaintif membeli rumah-rumah daripada pemaju projek perumahan ('defendan-defendan'). Defendan-defendan gagal untuk menyiapkan rumah-rumah itu dan akhirnya menghentikan projek perumahan itu. Pada tahun 1992, Kementerian Kerajaan Tempatan dan Perumahan mengambil alih projek tersebut tetapi plaintif-plaintif dikehendaki untuk membuat bayaran tambahan untuk penyiapan rumah-rumah mereka. Pada 10 September 1994, defendan-defendan mengikat perjanjian untuk menjual sebidang tanah kepada W Sdn Bhd pada harga RM1.7 juta. Dalam perjanjian tambahan bertarikh 11 September 1994, defendan-defendan mengakujanji untuk menyiapkan kerja-kerja tanah dan infrastruktur yang tertentu. Duti setem untuk perjanjian itu dibayar pada 22 Februari 1995. Defendan-defendan kemudiannya memberitahu W Sdn Bhd bahawa mereka tidak dapat menyiapkan kerja-kerja seperti yang ditetapkan di dalam perjanjian tambahan dan ekoran daripada itu RM1.3 juta ditolak daripada harga belian. Pada 8 Februari 1995, defendan-defendan meminta salah seorang daripada plaintif-plaintif untuk membatalkan kaveat yang dimasukkan. Sebagai akibatnya, plaintif-plaintif menuntut ganti rugi sebanyak RM1.2 juta dan memohon injunksi menghalang

defendan-defendan daripada melupuskan tanah tersebut. Defendan-defendan menimbulkan bantahan-bantahan permulaan seperti berikut: (i) bahawa plaintif-plaintif sepatutnya mendapatkan kebenaran institusi kewangan yang mana mereka telah menyerahkan hak-hak mereka sebelum memulakan tindakan itu; dan (ii) bahawa dokumen-dokumen berkaitan dengan tindakan itu tidak disampaikan dalam masa 14 hari selepas pemfailan seperti yang dikehendaki oleh A 32 k 13(2)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, memberikan injunksi:

(1) Hanya satu penyerahakkan mutlak, yang tidak bermaksud untuk menjadi dengan cara gadaian sahaja, yang menghalang penyerahhak daripada memulakan tindakan tanpa kebenaran pemegang serahhak. Untuk menentukan sama ada penyerahakkan adalah mutlak atau tidak, keadaan-keadaan sekitaran yang secara sah boleh diberi pertimbangan mesti diambil kira. Dalam kes ini, tujuan keseluruhan transaksi dan penyerahhakan adalah semata-mata untuk tujuan cagaran pinjaman itu. Oleh itu, penyerahakkan kepada institusi kewangan adalah dengan cara gadaian sahaja dan plaintif-plaintif boleh memulakan tindakan tanpa kebenaran institusi kewangan berkenaan.

(2) Dokumen-dokumen untuk permohonan itu tidak disampaikan di luar masa. Permohonan itu pada asalnya adalah secara ex parte, dan apabila mahkamah memerintahkan perbicaraan inter partes, tarikh perbicaraan yang baru tidak membenarkan pematuhan kepada A 32 k 13(2)(a) KMT. Apabila mahkamah memerintahkan perbicaraan inter partes pada tarikh yang baru, ia bermakna masa telah dipendekkan.

(3) Keseluruhan transaksi yang berkaitan dengan jualan tanah kepada W Sdn Bhd penuh dengan fraud dan cubaan untuk melesapkan aset-aset defendan-defendan. Tidak ada sebutan dalam perjanjian untuk jualan bertarikh 10 September 1994 mengenai kerja-kerja yang mesti dijalankan oleh defendan-defendan atau pengambilan liabiliti oleh mereka. Cukai pertambahan nilai harta tanah dikira dengan merujuk kepada harga beli dengan tidak mengambil kira tolakan sebanyak RM1.3 juta. Tidak ada penerangan berkenaan dengan mengapa perjanjian tambahan itu tidak disetem sehingga 22 Februaryi 1995 apabila ianya ditandatangani pada 11 September 1994. Oleh itu, terdapat bukti yang banyak untuk menyokong penghujahan bahawa perjanjian tambahan itu diundurkan tarikhnya dan dibuat untuk tujuan melesapkan aset-aset defendan-defendan sekiranya plaintif memperolehi penghakiman terhadap defendan-defendan.]

Notes

For cases on assignment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2379—2380.

A For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204; [1994] *Mallal's Digest* 192–199; [1995] Mallal's Digest 92–102.

For case on injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725; [1994] *Mallal's Digest* 305–335; [1995] B *Mallal's Digest* 193–221.

Cases referred to

Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 AMR 929 (folld)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd C [1984] 2 MLJ 268 (distd)

Legislation referred to

Banking and Fiancial Institutions Act 1989
Civil Law Act 1956 s 4(3)
D Real Property Gains Tax 1976
Rules of the High Court 1980 O 32 r 13(2)(a)

Raymond Szetu (*JNLS Associates*) for the plaintiffs
Sugumar Balakrishnan (*Sugumar & Co*) for the defendants.

E

Cur Adv Vult

Ian Chin J: On 9 February 1995, Loh Hoon Loi and 85 other persons ('the plaintiffs'), took out the present writ against Viewpoint Properties (Sabah) Sdn Bhd ('the defendant'), the developer of a housing estate F from whom the plaintiffs had bought houses under diverse agreements. The defendants had failed to complete the houses and had failed completely to build in so far as the 3rd and 84th plaintiffs are concerned. The housing project was abandoned by the defendants and on 22 November 1992, the Ministry of Local Government and Housing G took over control of the housing project and appointed a manager to, among other duties, manage and continue the housing project. In order to salvage the housing project, the plaintiffs were required to make additional payments for the 58 houses which they had purchased but which the defendants had failed to deliver. The total amount of additional payment, came to RM449,100 while the estimated cost of building the H two houses which were not built at all was RM310,000. There was also an estimated cost of RM285,000 for putting right the defects in the houses that were completed. As for the claim for liquidated damages for the failure to complete the houses within the time stipulated under the diverse agreements, it is estimated at RM1,207,254.15.

I *The application for injunction*

On 9 February 1995, the plaintiffs had also taken out an application against the defendants praying for the following orders:

(i) to restrain the defendants from disposing, transferring, or further charging and all dealing in whatsoever manner the properties known as Country Leases Nos 015263466, 015115858, 015018621 and 015018470; alternatively

(ii) to pay the remainder of the proceeds of the said properties, not exceeding RM3,000,000, into court after satisfying the charges registered against the said properties.

I heard counsel for the parties on 3 April 1995 and granted an injunction in the following terms:

> That the defendants either by themselves, their servants, agents or appointees be restrained from disposing, transferring, or further charging and perfecting any disposition and all land dealings in whatsoever manner the landed properties known as Country Lease No 015263466, West Coast Country Lease Nos 015018621 and 015018470 until trial of this action.

Preliminary objections

The defendants through their advocate, Mr Balakrishnan, submitted that the authority of all the plaintiffs had not been obtained to commence the present action. The first plaintiff had by an affidavit admitted that there was no authority from the 83rd plaintiff to commence the present action but had later exhibited the written authority of 17 other plaintiffs which was not initially done. It was also admitted that the 66th plaintiff should not have been one. The result at the end is that there is a sufficient number of plaintiffs that can maintain their several claims in the present action. The misjoinder of parties is a curable matter and does not defeat an application for an injunction.

The rights of the plaintiffs were alleged to have already been assigned to the financial institutions and that the plaintiffs have not obtained the consent those institutions to commence the present action. Mr Szetu, counsel for the plaintiffs, replied that the defendants only produced documents to establish that five of the plaintiffs, namely, the 1st, 2nd, 18th, 68th and 75th plaintiffs, had assigned their properties to the financial institutions while 80 other plaintiffs have not been so established. He continued that though the said five plaintiffs had assigned their interests that should not affect the application of the 80 other plaintiffs. I agree with that submission. It must not be forgotten that it is only an assignment not by way of charge that prevents the assignor from commencing an action without the authority of the assignee. There is no assertion that the assignments concerned were not by way of charge. Though counsel did not refer to any authority, I think the case concerning the right to commence an action after an assignment is *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268. In that case the purchaser of a unit in a shopping complex had commenced action after he had entered into a loan agreement and had assigned 'all his rights, title and interest in the property' pending the issue of the state title to the bank. The court there held that there

was an absolute assignment, not purporting to be a charge only, within the meaning of s 4(3) of the Civil Law Act 1956 and that therefore the purchaser was not competent to maintain the action. In the course of the judgment, this was what was said, (at p 270):

> It is plain that in very case of this kind, all the terms of the instrument must be considered, and whatever may be the phraseology adopted in some particular part of it, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 and the action must be brought in the name of the assignee [Mathew LJ in *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190]. Having stated the preliminary and before we examine the terms of the document of assignment dated February 18, 1978 we would dispose of a short submission of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

That statement, I humbly am of the opinion, seems to ignore the settled principle of law that in construing any written agreement the court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction. See *Lewison on Interpretation of Contracts*, at p 44, para 2.10, where various passages of various judgments are cited and I can do no better than just reproduce what is stated by the learned author:

> Accordingly, evidence of the surrounding circumstances is admissible in all cases to place the contract in its correct setting, even where there is no ambiguity apparent on the face of the document. Thus in *St Edmundsbury Ipswich Diocesan Board of Finance v Clark (No 2)* Sir John Pennycuick, delivering the judgment of the Court of Appeal said it was contended:
>
> > 'that the proper method of construction is first to construe the words of the instrument in isolation and then look at the surrounding circumstances in order to see whether they cut down the prima facie meaning the words. It seems to us that this approach is contrary to well-established principle. It is no doubt true that in order construe an instrument one looks at the instrument and no doubt one may form a preliminary impression on such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction.'
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> So also in *Hvalfangerselkapet Polaris A/S v Unilever Ltd*, Lord Russell of Killowen said:

> 'Before a Court begins to construe a written contract, it must know all the relevant circumstances which exist and are within the knowledge of the contracting parties at the time when they make their contract.'

A similar approach was adopted by Lord Wilberforce in his two speeches in *Penn v Simmonds* and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*, which are now the leading speeches expounding this principle. In the former case Lord Wilberforce said:

> 'The time has long since passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic consideration ... We must ... inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view.'

He continued:

> '... evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.'

In the latter case Lord Wiberforce said:

> 'No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.'

He continued:

> '.... what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.'

It seems to me that *Nouvau Dor (M) Sdn Bhd v Faber Development Sdn Bhd* had ignored the loan agreement that was executed and that was part of the 'surrounding circumstances' with the result that the aim of the transaction was totally ignored. Financial institutions are not in the business of buying properties and to construe the transaction in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* as an absolute assignment has that effect. Such a transaction, that is an assignment of property to a financial institution not by way of charge, is not sanctioned under the Banking and Financial Institutions Act 1989 since such assignment, which is not regarded as by way of a charge, would result in the financial institution being engaged in the business of buying and selling property which is not something that the Banking and Financial Institutions Act 1989 allows any financial institution to do. There is still another unreasonable result of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* and it is this. Every purchaser of property, who obtains a loan from a financial institution and who, because of the unavailability of an individual title to the property, employs the

instruments of a loan agreement and assignment which the court says is an absolute assignment and not by way of charge, would be that the purchaser would have to declare a disposal and the bank to declare an acquisition of an asset under the Real Property Gains Tax Act 1976. Similar declarations would have to be made conversely when the individual title to the property is thereafter issued and the purchaser becomes registered as the owner because this can only take place after the financial institution had either re-assigned or disposed the property back to the purchaser. Surely, that was not the aim of the transaction. The whole transaction involves a loan from the financial institution to the purchaser to enable the purchaser to purchase the property and the loan agreement and assignment was for the purpose of securing the loan. Notwithstanding the language used, surely that was the aim of the whole transaction and the assignment was purely for the purpose of securing the loan and hence the assignment must be by way of a charge. The loan agreement referred to in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* should not have been ignored. I would prefer to follow the principles of law stated in *Lewison on Interpretation of Contracts*, at p 44, para 2.10, supra, which seems to have been, though not specifically, the position adopted in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 AMR 929 at p 941 where it was said:

> Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration.

The assignment to the financial institutions in the instant case must surely have been by way of charge. The defendants did not produce any document to show otherwise. Thus, I am of the view that the plaintiffs can commence an action without the consent of the financial institutions.

The next preliminary objection was that the documents relating to the present application should have been served within 14 days of filing. The court was referred to O 32 r 13(2)(a) of the Rules of the High Court 1980. Mr Szetu replied, and I agreed with him, that the application was made ex parte until the court ordered the hearing to be inter partes which new date of hearing does not permit compliance with the said order. I am of the view that when the court ordered the matter to be heard inter partes on a new date, it means the time had been abridged by the said order. There is also no merit in this contention.

As for the last preliminary objection, Mr Szetu effectively submitted that though four of the plaintiffs had earlier commenced another suit, they have now elected to continue with the present suit.

I then proceeded to deal with the application on its merits.

Merits of application

Since Mr Balakrishnan did not take issue as regards whether there is a serious issue to be tried and as to where the balance of convenience lies, I will assume it is conceded that the plaintiffs have established that in their favour. In any event, the claim surely shows a serious issue to be

tried, that is whether the defendant was in breach of agreement to build the houses and the amount of damages payable as a result thereof. As for the balance of convenience, since the defendants contended that they have already disposed of everything, including the properties for which I have issued the restraining order, I do not see how the balance of inconvenience can be said to be in favour of the defendants. What was in contention was whether the disposal of the properties concerned was a disposal of the assets of the defendants to defeat the judgment which may be obtained against the defendants. I will now set out the facts relating to the disposal of the properties.

At all relevant times the defendants were the registered owners of the following properties, CL 015115858 ('the first parcel'), and CL 015018621, 015018470 & 015263466 ('the second parcel') and these lands were charged to Credit Corporation Malaysia Berhad to finance the defendants' housing development thereon. The Ministry of Local Government and Housing had on 22 November 1992, taken over the housing project and the various houses were issued temporary occupation certificates by the Kota Kinabalu Municipal Council on 22 January 1994, 16 February 1994 and 25 July 1994.

On 7 September 1994, the defendants entered into an agreement with Southern Kiongsing Steel Sdn Bhd under which the first parcel was sold to the latter company for RM3,900,000 which was to be paid upon the signing of the agreement to a firm of advocates, as stakeholders. A sum of RM195,000 of the said proceed was for payment of the real property gains tax, if any, while the balance of RM3,705,000 was for payment to Credit Corporation Malaysia Berhad to redeem the first parcel. We need not be concerned anymore of the facts of this particular transaction as the plaintiffs had, at the hearing, ceased their pursuit of the first parcel. On 10 September 1994, the defendants entered into another agreement, this one concerning the second parcel and with Winning Dividends Sdn Bhd under which the defendants sold the second parcel to Winning Dividends Sdn Bhd for RM1,770,000. From the proceeds of the second parcel sale, a sum of RM395,000 was to be paid to Credit Corporation Malaysia Sdn Bhd to contribute to the total redemption sum of RM4,100,000 for the two parcels and which the recital of this agreement says Credit Corporation Malaysia Bhd had agreed to accept as the redemption sum for the two parcels. The stamp duty of this agreement was paid on 10 September 1994, the date of the agreement. A sum of RM105,000 was to be paid to Chua & Rahman, the defendants' solicitors in the transaction, and the balance of RM1,270,000 to be held by the advocates for the purchaser, Winning Dividends Sdn Bhd, to be released to the said Chua & Rahman, in certain events which we shall not be concerned with. By 30 September 1994, the defendants was owing the said Credit Corporation Malaysia Berhad the sum of RM8,685,498.61. On 24 October 1994, the defendants managed to get the Credit Corporation Malaysia Berhad to sign an agreement accepting RM4,100,000 as satisfaction of the debt of RM8,685,498.61 owed to them by the defendants.

On 8 February 1995, Chua & Rahman wrote to the first plaintiff requesting him to remove the caveats lodged by him. The writ herein was then filed on 9 February 1995. When the first plaintiff came to know about the sale of both parcels of land, the plaintiffs made the present application for the injunction. It was the initial contention of the plaintiffs that the sale of the second parcel was at an grossly under-valued price, that is at RM1.42 per sq ft whereas the sale of the first parcel was at RM10.82 per sq ft. That was the only evidence of dissipation. After the application was filed, one Kong Pow Kim, a director of the defendants on behalf of the defendants, on 31 March 1995, deposed an affidavit, para 26 of which states:

> By letter dated 5 January 1995 the defendants informed Winning Dividends Sdn Bhd that it was unable to undertake and complete the earth and infrastructure works as stipulated in the supplementary agreement dated 11September 1994. By letter dated 11 January 1995 Winning Dividends Sdn Bhd informed the defendants that the sum of RM1,317,403 stipulated in the Supplementary Agreement has been deducted from the purchase price of the said properties. Annexed hereto are copies of the said letters dated 5 January 1995 and 11 January 1995 marked as exhibits 'KPK-21' and 'KPK-22' respectively.

As for the letter dated 5 January 5 1995, from the defendants to Winning Dividends Sdn Bhd, referred to in the said affidavit, the relevant part of it says:

> Re: 1. Sale & Purchase Agreement dated 10th September 1994
> 2. Supplementary Agreement dated 11th September 1994
> Property : CL015018161, CL015018470 & CL015263466
>
> The above refers.
>
> This is to notify your company that due to insufficient machineries and manpower, our company is not able to undertake and complete the earth and infrastructure works as stipulated in the abovementioned Supplementary Agreement.
>
> That being the case, your company is hereby authorised to deduct the cost of the earth and infrastructure works from the purchase price for the abovementioned property as stipulated in the abovementioned Sale and Purchase Agreement.
>
> (Signed Kong Pow Kim)

while the letter in reply of Winning Dividends Sdn Bhd dated 11 January 1995, the relevant part, reads:

> Your letter dated 5 January 1995 in respect of the above refers.
>
> This is to confirm that the purchase price for the abovementioned property has been deducted accordingly.
>
> As for the Supplementary Agreement dated September 1994, the stamp duty was only franked on February 22, 1995, the terms of which:

SUPPLEMENTARY AGREEMENT

This Supplementary Agreement is made the 11th day of Sept 1994

BETWEEN

Viewpoint Properties (Sabah) Sdn Bhd, a company incorporated in Malaysia and having its registered office at Block J, Lot 1, first Floor, HSK Industrial Centre Inanam, Km 12, Jalan Tuaran, 88300 Kota Kinabalu, Sabah (hereinafter called 'the Vendor' which expression shall where the context so admit include its successors, assignors and nominees) of the one part

AND

Winning Dividends Sdn Bhd a company incorporated in Malaysia and having its address at 2683, second Floor, Jalan Chainferry, Taman Inderawasih, 13600 Prai, Pulau Pinang (hereinafter referred to as 'the Purchaser' which expression shall where the context so admit include its successors, assignors and nominees) of the other part.

WHEREAS :-

1 The Vendor and the Purchaser had executed a Sale and Purchase Agreement on 10th September 1994 (hereinafter referred to as 'the Said Sale and Purchase Agreement') for the sale of the undeveloped portion of the lands described as Country Lease No. 015018621, 0150184470 and 015263466 (hereinafter referred to as 'the Said Land').

2 This Supplementary Agreement is supplemental to the Said Sale and Purchase Agreement.

NOW THIS SUPPLEMENTARY AGREEMENT WITNESSTH AS FOLLOWS:-

1 The Purchase Price for the Said Land stated in Clause 1 of the Said Sale and Purchase Agreement (hereinafter referred to as 'the Said Purchase Price') shall be subject to the Vendor at its own costs completing the infrastructure and earth works on the Said Land more particularly stated in Annexure I hereto (hereinafter referred to as 'the Said Infrastructure and Earth Works'). Annexure I shall form part of this Supplementary Agreement.

2 The Vendor shall commence the said infrastructure and earth works within two (2) months after the execution of the Deed of Settlement with Credit Corporation Malaysia Berhad and to completed the same within Eight (8) months after commencement of works.

3 In the event that the Vendor shall fail to commence the said infrastructure and earth works within the time stipulated in clause 2 hereinbefore, it is mutually agreed between the parties hereto that the amount of expenditure required for the said infrastructure and earth works in the sum of RM1,317,403.00 as stated in Annexure I hereto shall be deducted from the Said Purchase Price and the Said Purchase Price shall be adjusted accordingly.

IN WITNESS WHEREOF the parties hereunto sets their hands and seals the day and the year hereinabove written.

THE COMMON SEAL OF]
VIEWPOINT PROPERTIES]
(SABAH) SDN SHD is hereto]
affixed in the presence of:] COMMON SEAL

(Signed)
DIRECTOR

(Signed)
DIRECTOR/SECRETARY

THE COMMON SEAL OF WINNING]
DIVIDENDS SDN BHD is affixed]
hereto in the presence of-] COMMON SEAL

(Signed)
DIRECTOR

(Signed)
DIRECTOR/SECRETARY

ANNEXURE I

INFRASTRUCTURE and EARTH WORK — CL 015018621, CL 015018470 And CL 015263466

UNDEVELOPED PORTION AS PER DP NO R/542/65)

1. ROAD CONSTRUCTION

A. 22' – 0" wide carriageway,
3,498 Ft @ RM99 PFR RM 346,302.00

B. 24' – 0" wide carriageway,
825 Ft @ RM99 PFR RM 81,675.00

2. ROAD SIDE DRAIN
(11/2' x 2') 8650 Ft @ RM30 PFR RM 259,500.00

3. EARTH WORK

A. Earth Filling
15.5 Acres Average Fill 3' – 0' High
75,020 cu yd @ RM2.00 RM 150,040.00

B. Cut and Blast

1. EARTH
9 Acres Average 3'–0'
69,372 cu yd @ RM3,00 RM 87,120.00

2. SOFT ROCK
9 Acres Average 3'–0'
69,372 cu yd @ RM3.00 RM 193,116.00

3. HARD ROCK	
2.5 Acres Average 9'–0"	
36,300 cu yd @ RM5.50	RM 199,650.00
Total	RM1,317,403.00

As mentioned earlier, the stamp duty of this supplementary agreement though dated 11 September 1994 was only paid on 22 February 1995 after Chua & Rahman had by their letter to the plaintiffs' advocates dated 15 February 1995, declined acceptance of service of the writ herein on behalf of the defendants. The result of the supplementary agreement is that the defendants instead of having money still owing to them has now to repay about RM30,000 to Winning Dividends Sdn Bhd.

It was upon those undisputed facts that I had just set out that Mr Szetu had submitted, and I agreed with him, that the whole transaction reeks of fraud and an attempt to dissipate the assets of the defendants. In the first place not a word is said about the so-called infrastructural and earth works which have to be carried out on the undeveloped land which the defendants had agreed to sell to Winning Dividends Sdn Bhd let alone the defendants assuming that liability. The liability to pay the real property gains tax by the defendants was also reckoned by reference to the purchase price of RM1,770,000 and a sum of RM88,500 was for that purpose retained from the said purchase price. If really, the price included the liability on the part of the defendants to execute the said infrastructural and earth works amounting to RM1,317,403, it would have been easy enough to make provision for that in the original agreement and which certainly reduces the payment of the property gains tax by a very huge amount to the benefit of the defendants since that sum cannot form part of the consideration. Given the impecunious position of the defendants, I cannot see the defendants not taking that into account unless of course, the so-called infrastructural and earth works are a sham. The defendants did not bother to explain why the initial agreement did not make such a provision and what prompted the alleged supplementary agreement signed allegedly a day after the initial agreement of 10 September 1994. The defendants did not explain why the agreement of 10 September 1994 was stamped the same day and why the supplementary agreement was not stamped until 22 February 1995, though it was allegedly signed on 11 September 1994. That is not all, the supplementary agreement, cl 2, supra, refers to the 'Deed of Settlement' while the initial agreement signed a day earlier, on 10 September 1994, talks only of Credit Corporation Malaysia Bhd having agreed to accept a redemption sum of RM4,100.000. This brings me to the question of how the defendants were on 11 September 1994, able to predict the title name of 'Deed Of Settlement' as the title which the law firm of Wong Yapp Chung & Co had later, on 24 October 1994, used when drawing up the term for Credit Corporation Malaysia Berhad's acceptance of the said sum of RM4,100,000 in satisfaction of the debt owing to them by the defendants? Again, there was no explanation forthcoming from the defendants and the only explanation that is

A plausible, in the face of the silence of the defendants, is that the supplementary agreement come into existence only after the deed of settlement was signed on 24 October 1994. This belies the assertion of the defendants that the supplementary agreement was executed on 11 September 1994. Therefore, there is plenty of evidence to support the submission of Mr Szetu that the supplementary agreement was back-dated and made to siphon off the assets of the defendants to prevent the plaintiffs from laying their hands on the money in the event that they recovered judgment from the defendants. If anybody is aggrieved, it should not be the defendants because they have has nothing to gain under the supplementary agreement. It is Winning Dividends Sdn Bhd that stand to lose by the injunction granted by the court but I have still to see any application by Winning Dividends Sdn Bhd to intervene and to set aside the injunction. This case appears to me to be a very crude attempt to dissipate the assets of the defendants through the machination of an alleged supplementary agreement that was obviously, in the absence of explanation on the part of the defendants, back-dated.

It was for the reasons I have stated that I granted the injunction.

Application allowed.

Reported by Lindy Course